Filed 4/26/10 P. v. Avalos CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RALPH AVALINO AVALOS, Jr., Defendant and Appellant.	H032640 (Santa Clara County Super.Ct.No. CC586631)

A jury convicted the defendant, Ralph Avalino Avalos, Jr., of two sexual offenses. On appeal, he claims that the trial court misunderstood its discretion in imposing sentence, requiring resentencing, and that in any event his convictions must be reversed because the prosecutor committed misconduct, his counsel was ineffective for not bringing the misconduct to the court's attention, and the court erroneously allowed the prosecution to present evidence of other instances of sexual abuse.

We find no error or constitutional violation with regard to certain claims and no prejudice or constitutional violation with regard to others and will affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

I. *Charges, Convictions, and Sentence*

A first amended information charged defendant with one count of continuous sexual abuse of a child under age 14 (Pen. Code, § 288.5, subd. (a)), namely

V. Doe,[1] and one count of committing a forcible lewd or lascivious act on a child under age 14 (§ 288, subd. (b)(1)), namely M. Doe. The information also contained three enhancement allegations that defendant had suffered prior prison terms (§ 667.5, subd. (b)).

The jury returned guilty verdicts on both charges and defendant admitted the three prison-term allegations.

The trial court struck one of the three prison-term allegations on the prosecution's motion. On the continuous sexual abuse conviction the court imposed an aggravated term of 16 years. On the lewd or lascivious conduct conviction it imposed an aggravated term of eight years. It imposed full consecutive terms under the punishment provision for sexual offenders set forth in section 667.6, subdivision (c). It imposed two years for the two prison-term enhancements. The total sentence is 26 years in state prison.

II. *Facts*

A. *Prosecution Case*

Defendant sexually molested his niece V. Doe repeatedly and another niece, M. Doe, once or twice while they all lived in a house also occupied by the nieces' parents and other family members in San Jose. He also molested both girls in a bedroom of a house in the Merced County city of Los Banos.

M. Doe testified that defendant committed two sexual molestations on her at the San Jose house when she was about five or six years old. On the first occasion, defendant touched her chest and external genital area with his hand over her clothing. On the second, defendant enticed her into a walk-in closet. He hugged her from behind, took off her pants, and simulated sexual intercourse with her while keeping his pants on.

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[1] Further statutory references are to the Penal Code unless otherwise indicated.

Pursuant to section 293.5, the alleged victims were referred to as "[V.] Doe and [M.] Doe" throughout the proceedings.

The jury also heard testimony that defendant molested M. Doe in Los Banos. M. Doe testified that defendant touched her chest over her clothing. At the time, she was seven or eight years old. On other occasions, she was on the top bunk of a bunk bed while V. Doe and defendant were lying on the bottom bunk. M. Doe never saw defendant molest V. Doe in such instances, but a detective who interviewed M. Doe testified that M. Doe said that on one occasion when she looked down to the lower bunk she saw defendant on top of V. Doe and heard V. Doe say " 'stop.' "

V. Doe testified that defendant molested her regularly, starting when she was seven or eight years old. The first time, defendant and V. Doe were watching television in the living room of the San Jose house. He rubbed V. Doe's external genital area for a few minutes over her clothing. Defendant did the same thing on a separate occasion when he, V. Doe, and M. Doe were lying on a bed and watching television. In that incident defendant also took V. Doe's wrist and put her hand on his exposed, erect penis. V. Doe was about eight or nine years old at the time.

In addition, V. Doe testified about an incident that occurred in the garage of the San Jose house when she was eight or nine years old. Defendant removed her overalls, but she resisted and put them back on. On another occasion, defendant felt her breasts and external genitalia, apparently over her clothing, as both sat on his bed. On yet another occasion, defendant lay motionless on top of her for a few minutes on a bed. V. Doe was clothed during that incident. On still another occasion, defendant fondled V. Doe's external genital area under her clothing. She described five specific incidents of molestation at the San Jose house and stated that others occurred.

V. Doe testified additionally that defendant molested her more than once in Los Banos. He would do so by lying on top of her in the bottom bed of a bunk bed and simulating sexual intercourse, " 'humping' " her and moaning. At times, M. Doe would be present in the top bunk and could overhear the moaning. V. Doe was between the fourth and fifth grades when defendant was engaging in this type of molestation.

The girls' mother, M.F., testified that the girls revealed the molestations to her about three years after they said they occurred. V. Doe, a star student and athlete, had started to show disturbing attitudinal changes regarding school. V. Doe told her mother about the molestations on the eve of completing eighth grade. At the time, M. Doe was having her own problems in school, related to behavior, and she had had to repeat third grade. Later M.F.'s husband called her at work to report that both daughters were crying. She returned home and M. Doe told her that defendant had molested her. The mother learned that M. Doe and V. Doe had each just discovered that defendant had molested the other sister, which explained their crying.

V. Doe testified that when she was in the eighth grade her teacher went on jury duty. On the teacher's return, he recounted to her class that the case involved child sexual abuse charges. This prompted V. Doe to tell her mother about defendant's molestations. She testified that she told her mother first and M. Doe a month after that.

M. Doe testified that when V. Doe told her defendant had molested her, M. Doe told V. Doe that he had molested her too. At V. Doe's urging, M. Doe told their mother about the molestations.

B. *Defense Case*

Family members testified to one or more of the following circumstances: neither girl was reluctant to play in a closet where one or more molestation incidents allegedly occurred, nor did they seem uncomfortable around defendant, to fear him, or to try to avoid him.

The defense called V. Doe and M. Doe as witnesses on defendant's behalf, and they testified that they did not know a woman named Helen Leyvas, had never told anyone that they were not molested, and had never said that their mother was pushing them to have charges brought against defendant. Leyvas, defendant's aunt, then testified that she had last seen V. Doe and M. Doe about a year before Leyvas's appearance at trial. At that time both girls denied that defendant had molested them and told her that

their mother had persuaded them to invent the accusations. "[T]hey told me, no, *tía* [auntie], he did not . . . do it." Leyvas admitted that she had a long criminal history, was on parole, had committed crimes involving dishonesty and fraud, and had not reported the girls' purported denials to the police or the district attorney's office.

DISCUSSION

I. *Sentencing Issue*

Defendant claims that the trial court erred under state law by not stating reasons for imposing aggravated base prison terms. He acknowledges that the court stated reasons for imposing full consecutive sentences under the sex-crimes sentencing statute that the court decided had to apply in these circumstances, but observes that the court did not state separate reasons for imposing the upper term for each individual offense, i.e., the building blocks on which full consecutive sentences would rest.

We agree that the trial court erred during the sentencing procedure. In brief, the court should have sentenced defendant under section 667.6, subdivision (d), but it did not do so. Instead, it mistakenly sentenced defendant under section 667.6, subdivision (c), stating various reasons for doing so. We will accept the parties' view that the court was required to state separate reasons—i.e., reasons in addition to those it had stated for imposing full consecutive sentences—for imposing aggravated terms for the offenses. (See *People v. Osband* (1996) 13 Cal.4th 622, 728 (*per curiam*); but see *People v. Jones* (2009) 47 Cal.4th 566, 578.) If so, again it did not follow the correct procedure. As we will explain, however, any errors were harmless in light of the reasons the court stated for sentencing defendant (albeit erroneously) under section 667.6, subdivision (c).

In pertinent part, section 667.6 provides as follows:

"(c) In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least

one offense specified in subdivision (e). If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.

"(d) A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions.

"[¶] . . . . [¶] (e) This section shall apply to the following offenses:

"[¶] . . . . [¶] (5) Lewd or lascivious act, in violation of subdivision (b) of Section 288.

"(6) Continuous sexual abuse of a child, in violation of Section 288.5."

The trial court gave the following reasons for exercising the discretion it thought it had in favor of imposing full consecutive terms: "[I]n terms of aggravation," the court began, "the defendant was in a position of trust; . . . the victims were particularly vulnerable"; "offenses occurred while he was on parole; . . . he had a negative adjustment while on parole; . . . his criminal history where he had those two prior prison terms; and . . . the defendant is dangerous to the community, since attempts to rehabilitate him have proved to be unsuccessful . . . ." The court then stated, regarding whether to impose the upper, mid-, or lower term for each offense, that it was "taking all those points and factors into consideration" and that the upper term would apply on count one "for the reasons heretofore stated" and would apply on count two also as the "[s]ame aggravated term."

Confusion about sentencing may have arisen beginning with the probation report. The deputy probation officer correctly opined that because there were separate victims of eligible sex crimes defendant must be sentenced mandatorily to full consecutive terms—

because, we note, defendant met the requirements of section 667.6, subdivision (d). But her report erroneously cited as the legal authority for that sentence the other provision of section 667.6, namely subdivision (c) thereof, which gives the court discretion to impose or not impose full consecutive sentences according to reasons it must state when the case involves serious but slightly less grave criminal sexual conduct.

Thereafter, at the sentencing session, the parties disagreed about whether subdivision (c) or subdivision (d) of section 667.6 applied.

Defense counsel began by noting that "the probation officer indicated that she was sentencing [*sic*] under [section] 667.6[, subdivision] (c) and described that as requiring mandatory full term consecutive sentence" but "that's not true." "If my client was convicted of [section] 288[, subdivision] (b), then indeed the probation officer would be correct. But instead he's been convicted of one count of [section] 288.5 and one count of [section] 288[, subdivision] (b). So there is no mandatory full term consecutive sentencing. [¶] This is not a sub[division] (d) case. And sub[division] (c) is a discretionary case. The court has the discretion to sentence under [section] 667.6, but has to state a specific reason."

The prosecutor disagreed and argued in turn that "this is actually mandatory full time consec[utive], that there isn't the discretion that counsel is urging."

Given the last word, defense counsel said, "once again, I believe that the [section] 288.5 plus [section] 288[, subdivision] (b) do not equal—do not go under [section] 667.6[, subdivision] (d), which puts it under [section] 667.6[, subdivision] (c)[,] which is the discretionary 'may[,]' not shall or must."

The trial court agreed with defense counsel and ruled, "with respect to the sentencing choices that the court has . . . it's discretionary to the court whether it applies [less punitive] [section] 1170.1 sentencing . . . or [section] 667.6[, subdivision] (c)."

Because defendant molested both V. Doe and M. Doe and the jury found that he violated sections 288, subdivision (b), and 288.5, the trial court was required to sentence

defendant to full consecutive terms under section 667.6, subdivision (d); but the court incorrectly thought that section 667.6, subdivision (c)'s discretionary sentencing scheme applied. The prosecutor understood this but could not persuade the court. Defendant was required to be sentenced to full consecutive prison terms under section 667.6, subdivision (d), because (1) he was convicted of committing one sex crime against V. Doe and M. Doe each, and (2) the two crimes he committed—violations of sections 288, subdivision (b), and 288.5—are listed in section 667.6, subdivision (e), as qualifying crimes for punishment under section 667.6, subdivision (d).

The fact that defendant was not convicted of committing more than one violation of section 288, subdivision (b), or more than one violation of section 288.5, is immaterial, contrary to defense counsel's belief. We are aware of no authority holding that, for the punishment scheme of section 667.6 to apply, a defendant must have been convicted of multiple counts of one of the offenses listed in subdivision (e) thereof, rather than one count of more than one such offense. Nor do we see any such requirement in the statutory language. In addition, we note that section 667.6 sentences have been meted out in cases in which the defendant, like defendant here, committed one instance each of more than one of the sex crimes now enumerated in subdivision (e) thereof. (*People v. Siko* (1988) 45 Cal.3d 820, 823; see *People v. Hicks* (1993) 6 Cal.4th 784, 794 [a prior version of the statute "states the general rule that such sentences may be imposed for each violation of the enumerated offenses"], 796 [section 667.6 "was intended to allow enhanced punishment of certain sexual offenders who commit multiple offenses"].)

Having found error, we turn to the question of prejudice. Defendant requests that we remand the case for resentencing, but we conclude that doing so is not necessary.

"In order to determine whether error by the trial court in relying upon improper factors in aggravation requires remanding for resentencing 'the reviewing court must determine if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." [Citation.]' [Citation.] However,

'[t]he statutory preference for imposition of the middle term, when coupled with the requirement that aggravating circumstances must outweigh mitigating circumstances before imposition of the aggravated term is proper, creates a presumption.' [Citation.] Thus, the reviewing court may not simply ask whether the imposed sentence would be 'wholly unsupported or arbitrary in the absence of error' but must also reverse where it cannot determine whether the improper factor was determinative for the sentencing court." (*People v. Avalos* (1984) 37 Cal.3d 216, 233, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836 with regard to the reasonable probability standard of review for prejudice.)

In this case, the trial court stated that it was applying the aggravating factors it found both to the full consecutive sentencing determination (an unnecessary act) and to the imposition of the aggravated term for each offense (a necessary act). Because the court need have said nothing about the full consecutive sentencing determination, however, we may set aside any rule that a court must state separate reasons for imposing full consecutive sentences under section 667.6 and the upper term for specific offenses. Instead we may rely on the rule that "[o]nly a single aggravating factor is required to impose the upper term . . . ." (*People v. Osband*, *supra*, 13 Cal.4th at p. 728.) A fortiori, "if a single aggravating factor has been established in a manner consistent with [the rule that in some cases the trial court, rather than the jury, may find true certain facts and use them to increase a sentence]—by the jury's verdict, the defendant's admissions, or the fact of a prior conviction—the imposition by the trial court of the upper term does not violate the defendant's Sixth Amendment right to a jury trial, regardless of whether the trial court considered other aggravating circumstances in deciding to impose the upper term." (*People v. Towne* (2008) 44 Cal.4th 63, 75.) Among the factors that the court found in aggravation were that defendant was on parole when he committed the crimes and he had suffered two prior prison terms. These factors lie, either precisely or materially, within the ambit of rule 4.421 of the California Rules of Court, which lists

aggravating factors that may be considered in imposing sentence, both may be found by a court and do not require resolution by a jury (*Towne, supra*, at pp. 75-82), and, as noted, either sufficed to justify the upper term for each offense. Pursuant to rule 4.420(c) of the California Rules of Court, however, the court could not consider in aggravation defendant's service of two prior prison terms, because "a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so." (*Ibid.*) The court imposed punishment for the two prior prison terms; therefore, the fact of those terms' existence may not be considered in imposing an aggravated term. The fact that defendant was on parole, however, remains a valid sentencing factor justifying an aggravated term. (*Towne*, *supra*, at pp. 79-82.) We discern no reasonable probability that were we to remand the case for resentencing the court would arrive at a different finding and impose a lower sentence. Notably, the court found no mitigating factors at all. Accordingly, we find no prejudice. We reject defendant's claim.

II. *Prosecutorial Misconduct*

Defendant contends that the prosecutor committed misconduct when she elicited impermissible testimony from Carl Lewis, the prosecution's expert on so-called child sexual abuse accommodation syndrome, often referred to by its acronym CSAAS. He claims that the incident violated his rights under the federal and California constitutions.

Lewis testified that he is a police officer and "the supervisor of the sexual assault and domestic violence unit for the investigation bureau" of the district attorney's office. He had been a district attorney's investigator for eight years, had vast experience investigating alleged child abuse, and had provided expert testimony about CSAAS some 145 times.

The prosecutor's final question of Lewis on redirect examination was this: "In your experience in this county, how frequently have you seen a [nonoffending] parent prosecuted for sexual assault against their child?" Lewis answered, "I haven't."

We first consider the question of forfeiture. Defense counsel did not object to the question. " 'To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury.' [Citation.] There are two exceptions to this forfeiture: (1) the objection and/or the request for an admonition would have been futile, or (2) the admonition would have been insufficient to cure the harm occasioned by the misconduct. Forfeiture for failure to request an admonition will also not apply where the trial court immediately overruled the objection to the alleged misconduct, leaving defendant without an opportunity to request an admonition. A defendant claiming that one of these exceptions applies must find support for his or her claim in the record." (*People v. Panah* (2005) 35 Cal.4th 395, 462.)

The People argue that an admonition by the trial court would have cured any harm. (Moreover, they disagree that the incident constituted prosecutorial misconduct and believe it fell within the ambit of erroneous admission of evidence.) "The trial court could have informed the jury that experience in other cases was completely irrelevant to their task in the case at hand, which consisted of evaluating the evidence in this case to determine guilt or innocence. Further, . . . the court . . . could have flatly informed the jury, that . . . prosecutors occasionally prosecute individuals who are found by juries to be not guilty."

The proverbial bell would, however, have been hard to unring. Everyone knows that each case presents its own circumstances and that juries render not guilty verdicts. The question and answer, however, were narrowly focused and informed the jury in effect that in Santa Clara County it is unheard of to prosecute the innocent in circumstances like those alleged against defendant. It is possible, in our view, that an admonition would not have vitiated the impact of the colloquy on the jury. " 'Because the question whether defendants have preserved their right to raise this issue on appeal is close and difficult,

we assume that defendants have preserved their right.' " (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1007, fn. 8.)

We turn to the merits of defendant's claim.

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' " (*People v. Smithey* (1999) 20 Cal.4th 936, 960.)

" 'It is, of course, misconduct for a prosecutor to "intentionally elicit inadmissible testimony." [Citations.]' " (*People v. Smithey*, *supra*, 20 Cal.4th at p. 960.) So also is it to do so negligently. There is no requirement that "a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Any suggestion by the prosecution, through the prosecutor's remarks or through testimony the prosecution elicits through an ill-advised question, that the state would not prosecute the innocent is misconduct. In such a case, the prosecutor is vouching for the defendant's guilt. "[I]t is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation *of their office*, in support of it." (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207, italics added.)

Thus, it was a mistake to ask this question and quite likely improper to do so. Although defendant was not a parent, he was the victims' uncle, and asking the question was negligent in that one possible answer to it would skate too close to assuring the jury that the district attorney would not prosecute an innocent family member based on claims by minors that he abused them sexually.

Having found prosecutorial error, we turn to the question of the availability of a remedy.

With a narrow Sixth Amendment–implicating exception (see *People v. Harris* (1989) 47 Cal.3d 1047, 1083, overruled on another ground in *People v. Wheeler* (1992) 4 Cal.4th 284, 299, fn. 10) that neither party asserts to be of any relevance here, the standard of review on appeal regarding defendant's federal due process claim requires us to examine whether the trial was made fundamentally unfair as a result of the untoward question. (See *People v. Morales* (2001) 25 Cal.4th 34, 49, fn. 10; *People v. Sanders* (1995) 11 Cal.4th 475, 550.) As for state law, "[a] violation of state law . . . is cause for reversal [only] when it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the untoward [question]." (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.) The latter, of course, is an instance of the general prejudice standard set forth in *People v. Watson*, *supra*, 46 Cal.2d at p. 836.

Considering the state-law prejudice inquiry first, we find no prejudice. The victims' testimony was compelling and detailed. The testimony about the circumstances under which they eventually revealed defendant's sexual abuse of them—tearful behavior accompanying their revelations to their mother—showed sincerity and thereby lent additional credibility to their accounts of the abuse. Their mother's testimony about their school-related problems lent still more credibility to their testimony, particularly the difficulties of V. Doe, who had gone from being an academic and athletic star student to a troubled one. Against this, the question the prosecutor asked of Lewis, though ill-advised and negligent, could not have affected the outcome under the state-law standard of review for prejudice. The record does not show that the answer constituted the explosion of an evidentiary bombshell that would distract the jury from its task of ascertaining defendant's guilt on the facts involving him rather than guilt by association.

As for defendant's federal due process claim, to judge whether the prosecutor's question and the response it elicited rendered the trial fundamentally unfair we must consider the colloquy for its own absolute effect and the nature of the rest of the trial. The question was both fleeting and ambiguous, and the answer, which was also fleeting, could do no more than rest on the ambiguous nature of the question. The prosecutor did not seek to exploit the testimony at closing argument. Thus, the colloquy amounted to a minor glitch in the trial, one that worked to defendant's disadvantage and should not have occurred, but it did not, in itself, render the trial fundamentally unfair in violation of due process. If the rest of the trial had already been tainted by various instances of unfairness, this question could have tipped the balance in the direction of fundamental unfairness. But the rest of the trial was not so tainted. Defendant was " ' " 'entitled to a fair trial but not a perfect one.' " ' " (*People v. Osband*, *supra*, 13 Cal.4th at p. 702.) The trial's evidentiary phase was not free of error, but the procedures were fair at the fundamental level, and because "fundamental fairness [is] the touchstone of due process" (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 790), due process was afforded to defendant.

III. *Ineffective Assistance of Counsel*

Defendant next claims that counsel's failure to object to the question discussed in part II above constituted ineffective assistance of counsel.

A claim of ineffective assistance of counsel in violation of the Sixth Amendment entails deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of an adverse effect on the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694.)

In support of defendant's motion for new trial, counsel who had represented defendant during the trial's evidentiary phase filed an affidavit and also testified in court that during the presentation of evidence he was unwell and "exhausted" because of illness and injury and did not provide the high-quality representation that he expects of himself.

"I was unable to assess all witness testimony or 'think on my feet,' " he recalled in his affidavit.

Whether or not defense counsel was deficient for failing to object to the prosecutor's question to Carl Lewis and ask the trial court to strike Lewis's answer, we discern no prejudice. For the reasons stated in part II, we find no reasonable probability that the outcome would have differed had counsel managed to have the court direct the jury to disregard the colloquy. There was no ineffective assistance of counsel.

IV. *Ruling Permitting Introduction of Evidence on Los Banos Molestations*

Defendant claims that the trial court abused its discretion under state law and violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution when it ruled, during in limine proceedings, that the prosecution could introduce evidence of defendant's uncharged molestations of V. Doe and M. Doe in Los Banos. We do not agree.

Under the authority of Evidence Code section 1108, the prosecution moved to introduce evidence that defendant committed uncharged sexual offense against the two girls in Los Banos. The motion stated, correctly, that section 1108 permits introducing propensity evidence on this topic, and argued that evidence of defendant's propensity to molest V. Doe and M. Doe in Los Banos was probative of the question the jury must decide, i.e., whether he molested them in San Jose.

Defendant opposed introduction of the evidence on the grounds, as relevant to his appeal, that the evidence would be substantially more prejudicial than probative (Evid. Code, § 352). (He did not claim that introducing the evidence would violate his federal constitutional right to due process of law.) In a filing with the trial court, he argued that introducing evidence of it would be inflammatory: "the danger that the jury will convict based on prior conduct, as opposed to the current facts, is high."

The trial court disagreed and granted the prosecution's motion to introduce the evidence. As described in our summary of the facts, the jury heard evidence of the Los Banos molestations.

Subdivision (a) of Evidence Code section 1108 provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." The provision carves out an exception to the rule against admitting character evidence (*People v. Wilson* (2008) 44 Cal.4th 758, 797) and permitted the jury to hear the girls' testimony about events in Los Banos as evidence of defendant's propensity to commit the charged crimes that occurred in the San Jose house.

The trial court did not abuse its "broad discretion" (*People v. Wilson*, *supra*, 44 Cal.4th at p. 797; see Evid. Code, § 352) in permitting the jury to hear the evidence. "The evaluation of the potential for prejudice must consider numerous factors, including '[the prior sex offense's] nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.' [Citation.] Other relevant factors include whether the uncharged acts are more inflammatory than the charged conduct, the possibility the jury might confuse the uncharged acts with the charged acts and seek to punish the defendant for the uncharged acts, and the time required to present the evidence of the uncharged acts." (*People v. Daniels* (2009) 176 Cal.App.4th 304, 316-317.)

The prosecutor noted similarities between the charged San Jose molestations and the uncharged Los Banos incidents. The prosecutor stated that "after these incidents finished, the ones that he's charged with, when they next saw him again . . . in Los Banos . . . he again resumed with the same behavior." (The girls' testimony would bear out the prosecutor's assertion—defendant engaged in simulated sexual intercourse and sexual fondling in both cities—but we are here concerned with the allegations before the trial court when it had to decide the in limine motion.) The prosecutor's allegation that defendant behaved similarly in both cities made the evidence of the uncharged acts probative (see *People v. Daniels*, *supra*, 176 Cal.App.4th at p. 317; see also *id.* at pp. 315-316) because the corroborative elements, if established in court, would lend credibility to the two girls' accounts regarding the charged molestations. We see no potential for the testimony about the Los Banos incidents to confuse, distract, or inflame the jury—in essence, it was more of the same. The uncharged offenses were not remote in time—indeed, the charged and uncharged episodes of sexual molestation occurred closely in time. Finally, the girls' testimony about the Los Banos incidents was not particularly time-consuming.

Ultimately, the girls' testimony about defendant's uncharged sexual molestations was damaging to the defense, but that is not a legal impediment to its introduction. " 'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " ' " (*People v. Daniels*, *supra*, 176 Cal.App.4th at p. 317.)

Defendant's due process claim, which he raises on appeal as an additional legal consequence of the court's purportedly erroneous ruling, is not forfeited even though he did not present it to the trial court. (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 990, fn. 5; see *id*. at pp. 997, 1000, 1024, 1029, 1031, 1055.) In such a case, however, "rejection on the merits of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases, and we therefore provide none." (*Id*. at p. 990, fn. 5.) In sum, defendant's claim is without merit.

DISPOSITION

The judgment is affirmed.

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Duffy, J.

WE CONCUR:

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Mihara, Acting P. J.

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McAdams, J.